SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1970

No. 2430

ERNEST SAMUEL NOSSEN and E. S. NOSSEN LABORATORIES, INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONERS' REPLY BRIEF

DAVID TOREN
28 West 44th Street
New York, N. Y. 10036
Counsel for Petitioners

Of Counsel:

JOHN J. McGLEW
ALFRED E. PAGE
BERNARD X. McGLADY
ALEXANDER J. LEKUS

August 27, 1970.

SUBJECT INDEX

	PAGE
Introduction	1
I. The Government's assertion that the Gewecke patent process "would not work" if petitioners' interpretation is correct is contrary to the expressed views of the court below, is contrary to the opinions of seventeen experts and is contrary to published commentary on this case	2
II. The Government's assertion that its witnesses testified as to the temperature of Gewecke's agitated particle bed is false	3
III. The *Seymour* doctrine is controlling since the court below and the Government concede that the Gewecke patent does not disclose the crucial temperature	5
IV. The Government's brief contains many inaccurate and distortive statements which present the issue in a false light	7
Conclusion	13
Certificate of Service	13
Appendix I, Page from Patent Law Perspectives, Matthew Bender, May 1970 Supplement (Photostat)	15

Citations

Patent Law Perspectives, May 1970 Supplemental	2, 3
Seymour v. *Osborne*, 11 Wall. 516, 555	6
The New York Times, July 2, 1970, page 20	1

IN THE

Supreme Court of the United States

October Term, 1970

No. 243

ERNEST SAMUEL NOSSEN and E. S. NOSSEN LABORATORIES, INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONERS' REPLY BRIEF

Introduction

This reply brief is addressed to the arguments first raised in the Government's brief in opposition.

The New York Times of July 2, 1970, reported on page 20, that Mr. Chief Justice Burger addressed the lawyers of the Department of Justice on July 1, 1970, admonishing them to put fair administration of justice above winning cases. An excerpt of the address is quoted as follows:

> "The tradition of the department recognizes this idea that your responsibility is not to gain convictions or win cases, but to be fair and just in the exercise of the enormous powers which are given to you."

As will be demonstrated, the Office of the Solicitor General, rather than acting in this spirit, seeks to win by presenting arguments which are based on a motley of evasions, distortions, half-truths and outright falsehoods.

I. The Government's assertion that the Gewecke patent process "would not work" if petitioners' interpretation is correct is contrary to the expressed views of the court below, is contrary to the opinions of seventeen experts and is contrary to published commentary on this case.

The Government states (Resp. 9-10) that

> "(t)he testimony is clear that the Gewecke thermal decomposition process would not work unless the agitated bed of particles, at the time of spraying, were heated to a temperature at or above the decomposition temperature of aluminum nitrate."

The "clear" testimony allegedly supporting this statement is not mentioned by the Government, because there simply is *no* testimony, clear or otherwise, which could conceivably justify the statement. As a matter of fact, the statement is not only lacking evidentiary support but is belied by the expressed position of the court below. The court thus found that petitioners' interpretation, in which the agitated bed of particles, at the time of spraying, is at a temperature below the decomposition temperature, is "clear and coherent" (Pet. App. B, 5). It is implicit in the language of the opinion on rehearing that the court's original interpretation, which attributed to Gewecke the higher temperature, is factually wrong while petitioners' reading of the Gewecke patent is correct. That petitioners' understanding of the court's position is correct, is supported by the only commentary published so far in the patent law literature on this case. Attached hereto, as Appendix I, is a reprint from the May supplement of "Patent Law Perspectives", a Matthew Bender publication edited by Professors Donald R. Dunner, James B. Gambrell and Irving Kayton. The reprint discusses the *Nossen* case and states:

> "The Court of Claims held in *Nossen* v. *United States* that it will not grant a rehearing under its

> Rule 151 even though its understanding of the critical anticipating reference may be erroneous, since the plaintiff requesting the rehearing had an opportunity to introduce evidence clarifying the critical reference and the court's understanding of it but failed so to do."

While the discussion thus carries over the misconception that the court below had remanded the case to the commissioner on the Gewecke patent, as distinguished from the Gewecke publications, the discussion clearly recognizes that

> "it was implicit in the wording of the court's opinion, that Nossen could probably sustain his interpretation of the teaching of the Gewecke patent."

Considering that the remand had not included the Gewecke patent, that petitioners had been prevented from adducing evidence on the Gewecke patent during the remand, and that the commissioner, as the record shows (Pet. App. F), interpreted the remand to exclude the Gewecke patent, the discussion in "Patent Law Perspectives" highlights the blatant disregard for petitioners' constitutional rights as displayed by the court below in its decision on rehearing.

Further, each of the seventeen expert opinions, which were not challenged by the Government, supports petitioners' interpretation and rejects that of the court below. To state, in the light of these established facts, that, based on petitioners' interpretation, the Gewecke process "would not work" is not only false but ludicrous.

II. The Government's assertion that its witnesses testified as to the temperature of Gewecke's agitated particle bed is false.

In opposing this petition the Government presents the question whether the court below had "a reasonable basis in the evidence" (Resp. 2) for its conclusion that peti-

tioner's patent is anticipated by the Gewecke patent. In support of its position, the Government states, on page 9, footnote 9:

> "Mr. York testified that the Gewecke patent discloses the spraying of an aluminum nitrate solution on an agitated bed of aluminum oxide, the temperature of which would have to be above the thermal decomposition temperature of the metal nitrate solution (Tr. 747, 749-750). Dr. Lawroski testified that the Gewecke patent discloses the continuous calcining techniques used at Hanford (Tr. 623). At Hanford, it is conceded that a solution of uranyl nitrate is sprayed onto an agitated bed of uranium oxide, the temperature of which is maintained at a level higher than the thermal decomposition point of the uranyl nitrate solution (Pl. Exh. 3 (Q. & A. 53(d)). See generally Tr. 623-634 (Dr. Lawroski); Tr. 742-751, 876-884 (Mr. York)."

These statements are false. Neither Mr. York nor Dr. Lawroski testified that the agitated bed of Gewecke is hot at the time of spraying. The key sentences of Mr. York's testimony appear on pages 749-50 of the transcript and read as follows:

> "Now, subjecting the metal nitrate solution to a temperature higher than the decomposition temperature of said metal nitrate, the temperature of the metal nitrate of Gewecke, the temperature which it is subjected to, is not specifically given in the Gewecke patent. It says it is a thermal decomposition, and I must therefore make that further assumption here that if the patent says the thermal decomposition, the Gewecke patent is correct to that extent, and that it was a thermal decomposition temperature."

This testimony does not mention the agitated bed and Mr. York's assumption "that it was a thermal decomposition temperature" is meaningless in respect to the issue involved since it does not say *where* this temperature prevails.

In petitioners' interpretation, there is also a "thermal decomposition temperature" in the Gewecke patent, namely, in the decomposer where the solid aluminum oxide-aluminum nitrate mixture is decomposed. Mr. York's testimony certainly does not supply "a reasonably basis" for the court's interpretation of the Gewecke patent. Further, Mr. York disqualified himself as an expert in this field. He thus stated in respect to thermal decomposition, on page 813:

> "I would say I am not a chemical expert"

and on page 844:

> "I frankly have to say that I am no expert on this."

The statement that "(a)t Hanford, it is conceded that a solution of uranyl nitrate is sprayed onto an agitated bed of uranium oxide" is also false, because at Hanford the uranyl nitrate solution is not sprayed but

> "introduced below the surface of the agitated bed of hot UO_3 particles in four discreet streams spaced along the length of the reactor"

as stated by respondent's Dr. Szulinski in answer to interrogatory 53 (PX 3). While the Government's brief bristles with verbatim quotations from the record, the alleged "evidence" is not quoted for the good reason that there is none.

III. The *Seymour* doctrine is controlling since the court below and the Government concede that the Gewecke patent does not disclose the crucial temperature.

The Government states (Resp. 7, 8) that

> "(t)he crux of petitioners' argument in this Court is that the Gewecke patent does not disclose the temperature of the bed of aluminum oxide particles

at the time the particles are sprayed with aluminum nitrate solution."

This is untrue. The crux of petitioners' argument in this Court is that they were deprived of due process below by a decision not based upon evidence as to the facts and by the court's subsequent refusal to reconsider the facts on a fictitious ground. This is corroborated by the Government's brief because the Government does not deny that the crucial temperature indication is missing in Gewecke. Instead, it begs the question, *petitio principii*, by quoting at length from the findings of the court below which concede that the Gewecke patent does not mention the temperature. The legal implications flowing from the missing temperature information are disposed of in footnote 10, on page 10, where the Government states that

> "(t)here is no conflict with this Court's decision in *Seymour v. Osborne*, 11 Wall. 516, 555, since, as the court below expressly held, the Gewecke patent discloses 'within the four corners of the instrument' all of the elements of the Nossen patent 'in full, clear, and exact terms, as a foreign patent must do.'"

This statement ignores that the court below has also expressly conceded that the Gewecke patent does not "within the four corners of the instrument" disclose all of the elements of the Nossen patent. In particular, the decision below admits that Gewecke does not expressly disclose those crucial elements of the Nossen patent which are necessary for carrying out the Nossen process, but they have to be supplemented by conjecture. The court below thus stated:

> "This analysis implies that the bed is continuously maintained at a temperature at or above the temperature of thermal decomposition of aluminum nitrate, say 180° C, *but the patent nowhere expressly says this* . . ." (Pet. App. A, 6) (emphasis supplied).

> "Since Gewecke rejects mixing and then heating as 'batch-wise' he must intend in his own 'continuous' process to spray, mix, and heat simultaneously, *though he does not say so expressly.*" (Pet. App. A, 7) (emphasis supplied).

Concerning the clarity of the focal diagram of Chemiker-Zeitung, the court below stated:

> "*It is possible but not certain* that the diagram may potray (*sic*) the patent agitated bed method. It may portray the dry crystal method described in the text. *It may cover both, or some other.*" (Pet. App. A, 6) (emphasis supplied).

It follows that the court below has conceded in express language that the Gewecke patent does not disclose the crucial elements of the Nossen patent within the four corners of the instrument in full, clear and exact terms as a foreign patent must do. The *Seymour* doctrine is therefore controlling.

IV. The Government's brief contains many inaccurate and distortive statements which present the issue in a false light.

On page 5, the Government states in respect to petitioners' motion for rehearing that

> "attached to petitioners' motion was a poll of seventeen scientists with whom petitioner Nossen was acquainted."

This unsupported statement is false, since Dr. Nossen knows but two of the seventeen scientists. Not only had he not heard of the other fifteen, but none of the seventeen scientists knew which of the two presented interpretations (Pet. App. H) supported petitioners' position. On page 5, it is also implied that petitioners attempted to mislead the scientists by not sending them the two Gewecke

articles explaining the Geweeke discoveries". The two Geweeke articles do not explain or mention the Geweeke patent. The Geweeke patent is a self-contained document and has been thus used by the court below.

It is also inaccurate to state that petitioners supplied the scientists with their "own new explanation of the Geweeke patent (not previously presented to the court)". The explanation of the Geweeke patent which was submitted to the scientists was the same which had been given throughout the proceedings before the commissioner and the court below.

Further, it is misleading to state (Resp. 5) that petitioners submitted to the scientists "the court's explanation of the Geweeke patent, based upon the evidence presented at trial", since the court's explanation of the Geweeke patent is not based on the evidence presented at trial but is the court's own explanation which finds no support in the record. As a matter of fact, the court's explanation of the Geweeke patent is also different from that expressed by the commissioner in his original report.

On page 6, the Government states that the "seventeen scientists agreed that the new Nossen explanation was better than the court's explanation of the Geweeke patent". The fact is that the seventeen scientists agreed that the Nossen explanation, which was not new but the one adhered to throughout the proceedings, was not only better but *was the only* intelligible explanation. The court's explanation was rejected by each of the seventeen scientists.

The patented Geweeke process is succinctly summarized in the single claim of the patent which states:

> "that aluminum nitrate solution is mixed through jet spraying with agitated aluminum oxide and the mixture is preferably heated in vacuo and or by passing of steam or gases over the mixture."

The seventeen experts correctly interpreted this statement to mean that a mixture of the ingredients must first be formed and that the mixture is subsequently heated for

decomposition purposes. This interpretation is strengthened by the Gewecke specification which states (Pet. App. C) that

> "prior to decomposition . . . a solid product (is created) which preserves its properties as a solid during the entire heating process."

If, as the Government contends, the ingredients, to wit, aluminum nitrate and aluminum oxide, were heated at the time of spraying above the decomposition temperature of aluminum nitrate, substantially instantaneous decomposition of the aluminum nitrate into aluminum oxide would take place and, accordingly, no mixture of aluminum nitrate and aluminum oxide, as expressly called for by Gewecke, would ever come into existence. It follows, as recognized by each of the experts, that the Government's construction is clearly contrary to the expressed teachings of Gewecke.

In footnote 4 on page 6, the Government contends that "(s)everal of the scientists pointed out that the 'moving conveyor' motion . . . is a fictional concept nowhere depicted in the Gewecke patent". While it is true that a moving conveyor had not previously been emphasized by petitioners, the fact is that the presence of the conveyor is totally irrelevant to the issue in question. The Gewecke patent is concerned with a chemical process and does not disclose the mechanical means for carrying it into practice. Whether the solid materials involved are shoveled by a plant operator from the mixing unit to the decomposer or whether the transportation of the materials is accomplished more conveniently by a moving conveyor, has no bearing whatsoever on the occurrence of the chemical phenomena here of interest. Since Gewecke states that his multi-step procedure is "continuous" and it is common practice to move materials in a continuous multi-step process from one step to the other by some kind of mechanical conveying means, petitioners reasonably assumed and thus suggested that Gewecke makes use of a conveyor. There

is no good reason to inflate the importance of the conveyor and the Government's attempts in this direction can only mean that it wants to obfuscate the true issue in this petition. In essence, therefore, petitioners gladly concede that they have no positive proof that Gewecke intended the use of a conveyor, since none is disclosed in the patent, but the presence of a conveyor is likely. In this context, attention is directed to the explanation given by Dr. Brann, one of the scientists (Exhibit 2 of Toren affidavit accompanying petitioners' motion for rehearing), which is persuasive in this respect. Dr. Brann states:

> "Regarding the aluminum oxide particles it is said that they are 'moved' or agitated. The German word 'bewegt' (cf. page 1, line 37, page 1, line 44, and the claim, line 4), may be translated by 'moved' or 'agitated'. Neither a 'moving conveyor' nor a 'bed of aluminum oxide' is explicitly mentioned in the German patent specification No. 556,882. However, the reference to the fact that the process is not a batch process in contradiction to previously known processes (cf. page 2, lines 18-19) and that the decomposition takes place continuously (cf. page 2, lines 21-25), indicates the use of a 'moving conveyor' and of a 'bed of aluminum oxide' on this moving conveyor."

Further, Mr. Thiemann, in Exhibit 8, page 5, states as follows:

> "There is no mention in the Specification of a moving conveyor but since the process is said to be operable in a continuous manner it seems likely to me that some such conveyor must be present."

Moreover, Dr. Michael Cohn (Exhibit 6, page 2) writes:

> "As the invention described in the specification dates back to the year 1927, fluidized bed technique may safely be ruled out, since to the best of my knowledge this technique had not yet been developed at that time. This would leave the use of a conveyor

> bed as suggested by you as a possible implied method."

It follows that petitioners' present interpretation of the Gewecke patent is fully consistent with their previous position and respondent's unsupported contention to the contrary is without basis in fact.

A glaringly incorrect statement appears on page 9, where the Government, in respect to the Chemiker-Zeitung article, contends that

> "the author states that from the evaporator, the concentrated aluminum nitrate solution goes to the rotary calcining oven, in which it is heated to about 300-400 C while passing steam over it."

Disregarding the fact that there is no disclosure whatsoever in Gewecke that the calcining oven is "rotary", there is no statement that the concentrated aluminum nitrate solution "goes to the rotary calcining oven". According to Gewecke, the aluminum nitrate solution is first subjected to evaporation and cleavage in the evaporator. The description and the flow sheet of Chemiker-Zeitung indicate that in the evaporator large quantities of nitric acid are removed together with water, resulting in a solid product which is then conveyed to the calcining oven. Accordingly, no concentrated aluminum nitrate solution but a solid, partially decomposed product "goes to the calcining oven".

On page 10 of its brief, the Government states that "(t)here is thus no merit in petitioners' contention that the Gewecke process failed to disclose the proper temperature". This statement is contradicted by the court below. The original opinion (Pet. App. A, 6) thus finds that the temperature should be "say, 180 C, but the patent nowhere expressly says this". The court's construction of the Gewecke patent is solely founded on this assumed but undisclosed 180°C temperature.

The Government is also in error in its assertion, on page 11, that the Derr patent is not in evidence. The Derr patent is part of the file wrapper of the Nossen patent application which matured into the patent in suit. The file wrapper was put in evidence (PX 10), and since the Derr patent is part of the file wrapper, it was thus in evidence. The explanation of the differences between the teachings of Derr, which include Gewecke's process, and Nossen's process, as contained in the file wrapper, was not challenged by the Government during the trial.

On page 11 of its brief, the Government asserts that if petitioners' allegation, that the trial commissioner interpreted the court's remand order so as to exclude evidence on the Gewecke patent, is true, this "in no way precluded the Court of Claims from resting its decision on the Gewecke patent". Petitioners have no quarrel with this proposition, but the issue here involved is not the original decision of the Court of Claims but rather the refusal of the court below to reconsider its erroneous, unsupported conclusion solely on the basis of a remand which, according to the Commissioner's interpretation, did not embrace the Gewecke patent.

It is also wrong to state that "the record discloses no evidence of any such interpretation of the court's remand order by the trial commissioner" (Resp. 11), since the Toren affidavit (Pet. App. B) is part of the evidence in this case. Further, the Commissioner's supplemental report (Pet. App. F) expressly states that the remand had been restricted to the two Gewecke articles and did not include the Gewecke patent. The Government's contentions are therefore clearly contrary to the established facts of the record.

CONCLUSION

For all the reasons petitioners have presented, a writ of certiorari should issue to review the judgment and opinions of the U. S. Court of Claims.

Respectfully submitted,

DAVID TOREN
28 West 44th Street
New York, N. Y. 10036
Counsel for Petitioners

Of Counsel:

JOHN J. MCGLEW
ALFRED E. PAGE
BERNARD X. MCGEADY
ALEXANDER J. LEKUS

August 27, 1970

Certificate of Service

Three copies of the foregoing reply brief were served upon the Hon. Solicitor General, Department of Justice, Washington, D. C. 20530, by depositing the same in a U.S. Post Office at New York, New York, with first-class postage prepaid, addressed as above, and

One copy of the said reply brief was served upon William D. Ruckelshaus, Esq., Assistant Attorney General, Department of Justice, Washington, D. C. 20530, by depositing the same in a U.S. Post Office at New York, New York, with first-class postage prepaid, addressed as stated,

This 27th day of August, 1970.

DAVID TOREN
Counsel for Petitioners

APPENDIX L

Page from Patent Law Perspectives

(PHOTOSTAT)

(See opposite ☛)

§ E.3 Court of Claims (28 U.S.C. § 1498)

The Court of Claims held in *Nossen v. United States*[7] that it will not grant a rehearing under its Rule 151[8] even though its understanding of the critical anticipating reference may be erroneous, since the plaintiff requesting the rehearing had an opportunity to introduce evidence clarifying the critical reference and the court's understanding of it but failed so to do. The chronology of the procedure in the case is of importance for an appreciation of the court's position.

After the court rendered a decision[9] holding the Nossen patent invalid as directly anticipated by a 1932 German patent to Gewecke, Nossen had moved for a rehearing on the ground that a 1932 German patent could not properly be understood nor its effectiveness as a reference determined without understanding the state of the pertinent art in Germany at that time. Plaintiff accompanied his motion with seventeen affidavits by people expert in the art, all of which unanimously supported Nossen's interpretation of what the reference actually taught and which was directly contrary to the testimony of defendant's experts. It was implicit in the wording of the court's opinion that Nossen could probably sustain his interpretation of the teaching of the Gewecke patent. Moreover, for no apparently material judicial purpose, the court gratuitously volunteered that Dr. Nossen had been a German refugee from Nazism and while in the Netherlands had had his German citizenship revoked by Adolph Hitler. Nonetheless, the court showed that even if Nossen's interpretation of the anticipatory reference was correct, he had had more than ample opportunity to establish it during the proceedings prior to decision.

After the trial commissioner's first opinion[10] was submitted to

---

[7] —F.2d—, 165 U.S.P.Q. 82 (Ct. Cl. 1970).

[8] Ct. Cl. Rule 151 reads:

"Rehearings; Amendment of Judgments; New Trials. (a) Grounds. (1) A rehearing may be granted, a judgment may be altered or amended, or a new trial may be granted on any ground established by the rules of common law or equity applicable as between private parties."

See also Davis, *U.S. Court of Claims Patent Practice* (Patent Resources Group 1970).

[9] Nossen v. United State, —F.2d —, 163 U.S.P.Q. 421 (Ct. Cl. 1969).

[10] Nossen v. United States, —F. Supp.—, 152 U.S.P.Q. 619 (Comm'r Op. Ct. Cl. 1967).

the court and was disputed by plaintiff before the Court of Claims, the court remanded[11] the case to the trial commissioner for further opinion and findings on the similarities and differences between the patent in suit and the Gewecke reference. Nossen, however, moved shortly thereafter that no additional trial sessions be held and that no further evidence be adduced. As a consequence, the commissioner submitted a supplemental report[12] without the benefit of additional evidence and based solely on the arguments urged by the parties. The report reinstated the commissioner's original opinion of anticipation which the court affirmed per curiam. The motion for rehearing followed.

In denying the rehearing, the court pointed out that Dr. Nossen, a Ph.D. in chemistry and an expert in the relevant art while resident in Germany in 1932, might well have testified himself as to the state of the art in Germany at that time but failed to do so. The court was sympathetic to defendant's view that the plaintiff did nothing more during the trial than ridicule and argue the unintelligibility and ambiguity of the Gewecke patent and had only now come forth with seventeen affidavits alleging the reference to be intelligible with precision but contrary to defendant's interpretation. Under these circumstances the court believed that the granting of the motion would make litigation before the court an open-ended proposition which would jeopardize the confidence which litigants may place in the court's ability to render final judgment, especially when the plaintiff has a fair chance to present its position but fails to do so and gives no sufficient excuse for its failure, as in this case.

---

[11] Nossen v. United States, —F.2d —, 156 U.S.P.Q. 572 (Ct. Cl. 1968).

[12] Nossen v. United States, —F. Supp.—, 160 U.S.P.Q. 280 (Comm'r Op. Ct. Cl. 1968).